

HIGH COURT OF JAMMU & KASHMIR AND LADAKH
AT SRINAGAR

SWP No. 349/2011 (O&M)

Reserved on : 18.05.2023
Pronounced on : 03.08.2023

Sarwa Begum and ors. (LRs of Late Shabir Ahmad Dar) Petitioner(s)

Through:- Mr. S.A. Makroo, Sr. Advocate

v.

State of J&K and ors.Respondent(s)

Through:- Mr. Syed Musaib, Dy. AG

CORAM:

HON'BLE MR. JUSTICE WASIM SADIQ NARGAL, JUDGE

JUDGMENT

01. By virtue of this judgment, the present petition which was pending for about 12 years has been taken up for final disposal.

02. Petitioner has invoked Writ jurisdiction of this Court, under Article 226 of the Constitution of India, read with Section 103 of the Constitution of erstwhile State of J&K, for issuance of appropriate writ for fixation of his seniority, proper placement in the final seniority list and consequential release of his retrospective promotional benefits.

03. Be it noted that the petitioner passed away during the pendency of writ petition and legal representatives were already brought on record.

BRIEF FACTS

04. The case of the petitioner is that on the basis of the qualifications possessed by him, he came to be engaged as Sanitary Inspector in the grade of Rs.1200-2040 (Rs.4000-6000 pre-revised) and after being appointed as Sanitary Inspector, his appointment was confirmed by respondent no. 2 in terms of communication dated 20.11.1996. Since then, he has been performing his duties uninterruptedly and without any hindrance. It is averred that the posts of Sanitary Inspectors consist of two categories, i.e. **Diploma holder Sanitary Inspectors and Non-Diploma holder Sanitary Inspectors.**

As per the learned Senior Counsel for the petitioner, the non-diploma holder Sanitary Inspectors have been given the grade of Rs.4000-6000, while as the diploma holder Sanitary Inspectors have been given the grade of Rs.5700-10100. This aspect of the matter is substantiated from a bare perusal of the seniority list, which has been placed on the record by the petitioner and marked as annexure D along with the present petition, where the grade of Sanitary Inspector Diploma has been shown as (Rs.5000-8000) and the grade of Sanitary Inspector non-diploma has been shown as (Rs.4000-6000).

05. Further case of the petitioner is that he is a diploma holder with 10+2 qualification in science stream, as such, he was entitled to the grade of Rs.5700-10100. But inadvertently, he has been placed in a grade which was lower than the grade that was applicable to the Sanitary Inspector diploma holder i.e. Rs.4000-6000. This aspect of the matter is also corroborated from the order dated 20.11.1996 whereby the petitioner was appointed as Sanitary Inspector subject to confirmation by the Director, Local Bodies Kashmir in lower pay scale (Rs.1200-2040). Feeling aggrieved of the same, the petitioner has been continuously representing before the respondents to redress his

grievance insofar as release of his grade to the pay scale of Rs.5700-10100 is concerned, besides, seeking the fixation of his seniority in the category of Sanitary Inspectors with diploma holders. It is averred that the petitioner has filed first representation immediately after his appointment i.e. in 1997 (although the same is not on record) and thereafter in 2001, 2006, 2007, 2009 and 2010 is the latest representation. According to the petitioner, all these representations have neither been disposed of nor has any action been taken by the respondents.

06. It is the case of the petitioner that the Government of Jammu and Kashmir by virtue of notification vide SRO 417, dated 18th December, 2008, in exercise of power conferred by Section 307 and all other enabling provisions of Jammu and Kashmir Municipal Act, 2000, has been pleased to promulgate the rules, known as ***Jammu and Kashmir Urban Local Body Institutions (Management) Service Recruitment Rules 2008***, which have come into force from the date of the publication i.e. 18.12.2008. According to the petitioner, Schedule-I, attached with the aforesaid rules is manifestly clear that the pay scale of the Sanitary Inspector has been shown as Rs.5700-10100 and the qualification which has been prescribed in the aforesaid rules is 10+2 in science with one year's Sanitary Inspector Diploma Course from recognized institution and the petitioner fulfils the requisite criterion as envisaged in the aforesaid rules and thus, was entitled for the aforesaid grade from the date he came to be appointed i.e. on 20th November 1996.

07. Further case of the petitioner is that in terms of the aforesaid rules and on the basis of qualification possessed by him, he was also entitled to the promotion for the next higher post i.e. Assistant Sanitation Officer falling in the grade of Rs.6700-10700. The requisite qualification for the post of

Assistant Sanitation Inspector is indicated in the rules issued under SRO 417, which prescribed as under:

<i>Class</i>	<i>Category</i>	<i>Name of the post</i>	<i>Pay Scale</i>	<i>Minimum Qualification for direct recruitment</i>	<i>Method of recruitment</i>
II	b	Assistant Sanitation Officer	6700-10700		By promotion from Class III Category (a) having 5 years' service in that class and category

08. As per the above said rule, Class-III Category (a), employees are eligible for the post of Assistant Sanitation Officer. The following post falls in Class-III Category (a):

<i>Class</i>	<i>Category</i>	<i>Name of the Post</i>	<i>Pay Scale</i>	<i>Minimum Qualification for direct recruitment</i>	<i>Method of recruitment</i>
III	a	Sanitary Inspector	5700-10100	10+2 in Science with one year's Sanitary Inspector's Diploma Course from recognized Institute	(i)75 % by direct recruitment (ii) 25% by promotion from Class-V, Category (f) having 10 years' experience as such and having passed 10+2with Science and one year's Sanitary Inspector's Diploma course from recognized Institution.

09. It is specific case of the petitioner that his case is covered under rules for the promotion to the post of Assistant Sanitation Officer as he is the appointee of the year 1996, having more than five years of service in Class-III Category (a), i.e., in Sanitary Inspectors' category. However, due to inaction on the part of the respondents in reflecting his name in the diploma holder category has caused great prejudice to him for being considered for the promotion to the next higher post. Although, the petitioner has given 'in situ' promotion in the grade of Rs.4500-7000, but yet the same was less than to pay scale as being paid to other Sanitary Inspector and as such, the petitioner was

aggrieved of the inaction on the part of the respondents of not paying him the requisite grade which was being paid to other similarly situated persons having diploma in Sanitary Inspector course. It is specific case of the petitioner that he has been discriminated viz-a-viz. similarly situated employees who were given higher pay scale being diploma holder with the sole exception of the petitioner who was being paid lower grade in spite of the fact that he was having diploma prior to the date of his appointment.

Arguments of learned counsel for the petitioner

10. Mr. S. A. Makroo, learned counsel appearing for the petitioner vehemently argued that that the grade which was applicable to the post of Sanitary Inspector with Diploma has been released prospectively but the grievance of the petitioner for the release of the grade retrospectively from 1996 has not been redressed in spite of various representations. Learned counsel has placed strong reliance on the recommendation dated 31.12.2009 issued by Executive Officer Municipal Committee, Ganderbal to the Director, Urban Local Bodies Kashmir, whereby a request has been made to release the grade of Rs.5700-10100 in favour of the petitioner retrospectively and the respondents have admitted that the post of Sanitary Inspector carries the pay scale of Rs. 5700-10100.

11. Learned counsel for the petitioner submits that in the year 2008 both the grades of non-diploma holder and diploma holder have been merged in one common pay scale i.e., Rs.5700-10100 in the category of the Sanitary Inspector and since the pay scale of Rs.5700-10100 was applicable to the post of Sanitary Inspector and this was precisely the reason that the petitioner got the aforesaid grade in the year 2010, subject to the confirmation of the Departmental Promotion Committee.

12. With a view to substantiate his claim, learned counsel for the petitioner has placed on record the Govt. order bearing no. 25UD/LM of 1974, 7th January, 1974, wherein in pursuance of the Cabinet Decision no. 389 dated 19th September 1973, the Municipality Notified Area Committee and the Town Area Committee have been authorised to make appointments in accordance with the powers vested in them under the Local Bodies Legislations. It has also been reflected in the aforesaid Government Order that no reference to the Government would be necessary subject to the condition that such posts have been created and filled out of the resources generated by the respective Local Bodies. The learned counsel for the petitioner further submits that respondents, in their reply, have nowhere disputed with regard to the eligibility of the petitioner for having the grade which was applicable to the Sanitary Inspector Diploma holder.

13. Learned counsel appearing for the petitioner further submits that he is pressing the relief at this stage only to the extent of the release of grade retrospectively from the date he was eligible and denied by the respondents, without any justifiable cause. He submits that this Court by virtue of order dated 3rd August, 2022, has already allowed the application filed by the petitioner for bringing on record the legal heirs of the deceased petitioner, as during the pendency of the aforesaid petition, the petitioner namely Shabir Ahmad Dar has expired and resultantly, his legal heirs have been brought on record.

Arguments on behalf of respondents

14. *Per contra*, Mr. Syed Musaib, learned Dy. AG appearing for the respondents have referred to the prayer of the petitioner, in which, the petitioner has prayed for Writ of Mandamus seeking a direction to the

respondents to place him in the grade of Rs.5700-10100, retrospectively from the date of his initial engagement i.e. 20th November, 1996, besides seeking writ of certiorari, quashing of seniority list of non-diploma holder Sanitary Inspector to the extent of placement of the petitioner in the grade pay of Rs.4000-6000, without throwing challenge to the said Seniority list.

15. Learned counsel for the respondents submits that since the rules have come into force in the year 2008 and the petitioner, by no stretch of imagination, could claim the aforesaid grade retrospectively from 20th November, 1996, and thus the prayer cannot be acceded to at this stage. Learned counsel submits that the petitioner is estopped under law to question the appointment order at this stage when he has gladly and voluntarily accepted the same way back in the year, 1996 without any demur. Learned counsel further submits that the present writ petition is not maintainable in the eyes of law as the petitioner through the medium of this writ petition is calling in question the seniority list without arraying the effected persons as party respondents. In absence of the same, the present writ petition is not maintainable insofar as the challenge to the seniority list is concerned.

Rebuttal

16. With a view to counter the claim of the respondents that the appointment of the petitioner as Sanitary Inspector was contrary to the established rules, Mr. Makro, learned Sr. Advocate appearing for the petitioner has also filed the rejoinder affidavit, in which, it has been submitted that the petitioner was engaged by a Competent Authority, i.e. Administrator Notified Area Committee, Sumbal and the said appointment of the petitioner as Sanitary Inspector vide order dated 20.11.1996 was subject to confirmation from the Director Local Bodies, Kashmir and was accordingly, confirmed vide

order dated 20th November, 1996 being eligible and having diploma in the relevant field and thus, the petitioner was entitled to be placed in the higher grade i.e. Rs.5000 to 8000 (pre-revised from the date the petitioner came to be appointed). The stand of the respondents that the petitioner was not eligible, does not hold good at this stage, more particularly, in light of the issuance of the order dated 27th October, 2010, vide no. 775 of 2010, wherein the petitioner has been given the grade of Rs.5700-10100 by the respondents pending clearance by the Departmental Promotional Committee (DPC) in a step towards the rationalization of the staff of the various Municipal Bodies as envisaged vide Government Order No. 214 HUD of 2008. Once, the petitioner has been released the requisite grade prospectively, it does not lie in the mouth of respondents to agitate at this belated stage that the engagement/appointment of the petitioner was bad in the eyes of law, when the respondents never disputed the appointment of the petitioner for more than two decades rather the respondents released the grade prospectively subject to clearance of the DPC.

17. Learned counsel has also argued that the petitioner has specifically pleaded in para 6 of the writ petition that he was entitled to grade of Rs.5700-10100, retrospectively from the date he came to be appointed as his seniority was fixed in the category of the Sanitary Inspector with diploma holder prospectively. The assertion of the petitioner in para 6 has not been specifically denied by the respondent which would tantamount to admission on the part of the respondents.

Legal Analysis

1. Heard learned counsels for the parties and perused the record.

2. Learned counsels for the parties have reiterated their respective pleadings in arguments.

18. It is admitted case of the parties that the petitioner is a diploma holder in Sanitary Inspector Course and on the basis of the said qualification, the petitioner was appointed as Sanitary Inspector in the grade pay of Rs. 1200-2040 (4000-6000 pre-revised) by the Administrator, Notified Area Committee, Sumbal, who, being the competent Authority at that relevant point of time and after petitioner came to be appointed as Sanitary Inspector in terms of order dated 20.11.1996, his appointment came to be confirmed by respondent No. 2 i.e. Director, Urban Local Bodies, Kashmir. From the record, it is apparently clear that the posts of Sanitary Inspectors consist of two categories i.e. Diploma Holder Sanitary Inspectors and non Diploma Holder Sanitary Inspectors. In so far as non-diploma Holder Sanitary Inspectors are concerned, they have been given the grade of Rs.4000-6000, whereas the Diploma Holder Sanitary Inspectors have been given the grade of Rs.5700-10100. Record further reveals that petitioner, being 10+2 having diploma in the relevant field, was entitled to higher grade i.e. Rs.5000-8000 from the date he came to be appointed but said grade was not given to him, compelling the petitioner to move various representations from time to time. Record further reveals that the respondents after realizing the said mistake, redressed the grievance of the petitioner partially as the petitioner was given the grade of Rs.4500-7000 vide order dated 28.04.2006 and the release of the aforesaid grade was not in consonance with the rules. Respondents, however, redressed the grievance of the petitioner, finally in the year 2010 when order No. DULB/ESTT/775 of 2010 dated 27.10.2010 came to be passed wherein the petitioner was placed in the pay scale of Rs. 5700-10100 pending clearance of the Departmental

Promotion Committee (DPC) in furtherance of a step towards rationalization of the staff of various Municipal Bodies as envisaged vide Government Order No. 294-HUD of 2008 dated 23.05.2008.

19. In view of the aforesaid factual background, it is manifestly clear that petitioner was appointed by the competent authority in the year 1996 when SRO 417 was not in vogue and at that relevant point of time, it was Administrator of the Notified Area Committee who was the competent authority to make such appointments subject to the condition that the appointment, so issued, would be subsequently confirmed by Head of the Department i.e. Director, Urban Local Bodies Kashmir. In so far as the case of the petitioner is concerned, it is an admitted case of the parties that the petitioner was confirmed by the competent authority in the year 1996 and even the grade has been released in his favour as Sanitary Inspector vide Order dated 27.10.2010 prospectively but his grievance for release of his grade retrospectively from the date of his initial appointment i.e. 20.11.1996, has not been redressed with the result that further promotion of the petitioner for the post of Assistant Sanitary Officer also stood jeopardized.

20. The stand of the respondents that the appointment of the petitioner is contrary to the rules, has no legal basis in light of the fact that the appointment of the petitioner was never disputed by the respondents for all along these years and rather, the erstwhile Government of J&K State has even released the grade in his favour pending clearance by the DPC vide Order dated 27.10.2010 pursuant to accord of sanction for grant of *in situ* promotion in favour of the petitioner from the pay scale of Rs.4000-6000 to Rs.4500-7000 w.e.f. 01.12.2005 on the strength of the order dated 28.04.2006 issued by respondent No.2. It is not so, even the Executive Officer, Municipal

Committee Ganderbal, by virtue of communication dated 31.12.2009, has strongly recommended the case of the petitioner to respondent No.2 by admitting that petitioner is entitled to grade of Rs.5700-10100 retrospectively from the date he came to be appointed by placing reliance on various appreciation letters issued in his favour from time to time. The stand of the respondents in the objections is contrary to the record and has no legal basis and accordingly, the same is rejected.

21. The respondents cannot be allowed to blow hot and cold in the same breath when the respondents, on the one hand, have recommended the case of the petitioner for the release of the grade retrospectively from the date of his appointment on the basis of excellent APRs and on the other hand, the respondents have taken altogether contrary stand in their objections that the appointment of the petitioner is contrary to the rules and hence the petitioner is not entitled for further promotion. Respondents, all along these years, never disputed the eligibility of the petitioner to hold the post of Sanitary Inspector and rather the record reveals that the respondents have recommended the case of the petitioner for release of the grade retrospectively from the date of his appointment and even the respondents have released the grade of Sanitary Inspector prospectively in the year 2010. The stand of the respondents in their objections has no legal basis and thus is liable to be rejected.

22. The law does not allow anyone to both appraise and reprobate. A person cannot be allowed to have the benefit of an instrument while questioning the same.

23. I am fortified by the judgment passed by the Apex Court in case titled **Union of India versus N. Murugesan** reported as **(2022) 2 SCC 25**. Paragraphs 26 and 27 of the said judgment are reproduced hereunder:-

“APPROBATE AND REPROBATE:

26. These phrases are borrowed from the Scots law. They would only mean that no party can be allowed to accept and reject the same thing, and thus one cannot blow hot and cold. The principle behind the doctrine of election is inbuilt in the concept of approbate and reprobate. Once again, it is a principle of equity coming under the contours of common law. Therefore, he who knows that if he objects to an instrument, he will not get the benefit he wants cannot be allowed to do so while enjoying the fruits. One cannot take advantage of one part while rejecting the rest. A person cannot be allowed to have the benefit of an instrument while questioning the same. Such a party either has to affirm or disaffirm the transaction. This principle has to be applied with more vigour as a common law principle, if such a party actually enjoys the one part fully and on near Page 20 of 27 WP (C) No.639/2022 completion of the said enjoyment, thereafter questions the other part. An element of fair play is inbuilt in this principle. It is also a species of estoppel dealing with the conduct of a party. We have already dealt with the provisions of the Contract Act concerning the conduct of a party, and his presumption of knowledge while confirming an offer through his acceptance unconditionally.

27. We would like to quote the following judgments for better appreciation and understanding of the said principle:

27.1. Nagubai Ammal v. B. Shama Rao, 1956 SCR 451:

“23. But it is argued by Sri Krishnaswami Ayyangar that as the proceedings in OS. No. 92 of 1938-39 are relied on as barring the plea that the decree and sale in OS. No. 100 of 1919-20 are not collusive, not on the ground of res judicata or estoppel but on the principle that a person cannot both approbate and reprobate, it is immaterial that the present appellants were not parties thereto, and the decision in *Verschures Creameries Ltd. v. Hull and Netherlands Steamship Company Ltd.* [(1921) 2 KB 608], and in particular, the observations of Scrutton, LJ, at page 611 were quoted in support of this position. There, the facts were that an agent delivered goods to the customer contrary to the instructions of the principal, who thereafter filed a suit against the purchaser for price of goods and obtained a decree.

Not having obtained satisfaction, the principal next filed a suit against the agent for damages on the ground of negligence and breach of duty. It was held that such an action was barred. The ground of the decision is that when on the same facts, a person has the right to claim one of two reliefs and with full knowledge he elects to claim one and obtains it, it is not open to him thereafter to go back on his election and claim the alternative relief. The principle was thus stated by Bankes, L.J.:

“.....Having elected to treat the delivery to him as an authorised delivery they cannot treat the same act as a misdelivery. To do so would be to approbate and reprobate the same act”.

The observations of Scrutton, LJ on which the appellants rely are as follows:

“A plaintiff is not permitted to ‘approve and reprobate’. The phrase is apparently borrowed from the Scotch law, where it is used to express the principle embodied in our doctrine of election— namely, that no party can accept and reject the same instrument: Ker v. Wauchope [(1819) 1 Bli 1, 21] : Douglas-Menzies v. Umphelby [(1908) AC 224, 232] . The doctrine of election is not however confined to instruments. A person cannot say at one time that a transaction is valid and thereby obtain some advantage, to which he could only be entitled on the footing that it is valid, and then turn round and say it is void for the purpose of securing some other advantage. That is to approve and reprobate the transaction”.

It is clear from the above observations that the maxim that a person cannot ‘approve and reprobate’ is only one application of the doctrine of election, and that its operation must be confined to reliefs claimed in respect of Page 21 of 27 WP (C) No.639/2022 the same transaction and to the persons who are parties thereto. The law is thus stated in Halsbury’s Laws of England, Vol. XIII, p. 464, para 512:

“On the principle that a person may not approve and reprobate, a species of estoppel has arisen which seems to be intermediate between estoppel by record and estoppel in pais, and may conveniently be referred to here. Thus a party cannot, after taking advantage under an order (e.g. payment of costs), be heard to say that it is invalid and ask to set it aside, or to set up to the prejudice of persons who have relied upon it a case inconsistent with that upon which it was founded; nor will he be allowed to go behind an order made in ignorance of the true facts to the prejudice of third parties who have acted on it”.

27.2. State of Punjab v. Dhanjit Singh Sandhu, (2014) 15 SCC 144:

“22. The doctrine of “approve and reprobate” is only a species of estoppel, it implies only to the conduct of parties. As in the case of estoppel it cannot operate against the provisions of a statute. (Vide CIT v. V. MR. P. Firm Muar [CIT v. V. MR. P. Firm Muar, AIR 1965 SC 1216]).

23. It is settled proposition of law that once an order has been passed, it is complied with, accepted by the other party and derived the benefit out of it, he cannot challenge it on any ground. (Vide Maharashtra SRTC v. Balwant Regular Motor Service [Maharashtra SRTC v. Balwant Regular Motor Service, AIR 1969 SC 329] .) In R.N. Gosain v. Yashpal Dhir [R.N. 13 Gosain v. Yashpal Dhir, (1992) 4 SCC 683] this Court has observed as under: (SCC pp. 687-88, para 10)

“10. Law does not permit a person to both approve and reprobate. This principle is based on the doctrine of election which postulates that no party can accept and reject the same instrument and that ‘a person cannot say at one time that a transaction is valid and thereby obtain some

advantage, to which he could only be entitled on the footing that it is valid, and then turn round and say it is void for the purpose of securing some other advantage’.”

25. The Supreme Court in *Rajasthan State Industrial Development and Investment Corpn. v. Diamond and Gem Development Corpn. Ltd.* [Rajasthan State Industrial Development and Investment Corpn. v. Diamond and Gem Development Corpn. Ltd., (2013) 5 SCC 470 : (2013) 3 SCC (Civ) 153], made an observation that a party cannot be permitted to “blow hot and cold”, “fast and loose” or “approbate and reprobate”. Where one knowingly accepts the benefits of a contract or conveyance or an order, is estopped to deny the validity or binding effect on him of such contract or conveyance or order. This rule is applied to do equity, however, it must not be applied in a manner as to violate the principles of right and good conscience.

26. It is evident that the doctrine of election is based on the rule of estoppel, the principle that one cannot approbate and reprobate is inherent in it. The doctrine of estoppel by election is one among the species of estoppel in pais (or equitable estoppel), which is a rule of equity. By Page 22 of 27 WP (C) No.639/2022 this law, a person may be precluded, by way of his actions, or conduct, or silence when he has to speak, from asserting a right which he would have otherwise had.”

27.3. Rajasthan State Industrial Development & Investment Corpn. v. Diamond & Gem Development Corpn. Ltd., (2013) 5 SCC 470:

“I. Approbate and reprobate

15. A party cannot be permitted to “blow hot-blow cold”, “fast and loose” or “approbate and reprobate”. Where one knowingly accepts the benefits of a contract, or conveyance, or of an order, he is estopped from denying the validity of, or the binding effect of such contract, or conveyance, or order upon himself. This rule is applied to ensure equity, however, it must not be applied in such a manner so as to violate the principles of what is right and of good conscience. [Vide *Nagubai Ammal v. B. Shama Rao* [AIR 1956 SC 593], *CIT v. V. MR. P. Firm Muar* [AIR 1965 SC 1216], *Ramesh Chandra Sankla v. Vikram Cement* [(2008) 14 SCC 58 : (2009) 1 SCC (L&S) 706 : AIR 2009 SC 713], *Pradeep Oil 14 Corpn. v. MCD* [(2011) 5 SCC 270 : (2011) 2 SCC (Civ) 712 : AIR 2011 SC 1869], *Cauvery Coffee Traders v. Hornor Resources (International) Co. Ltd.* [(2011) 10 SCC 420 : (2012) 3 SCC (Civ) 685] and *V. Chandrasekaran v. Administrative Officer* [(2012) 12 SCC 133 : (2013) 2 SCC (Civ) 136 : JT (2012) 9 SC 260].

16. Thus, it is evident that the doctrine of election is based on the rule of estoppel—the principle that one cannot approbate and reprobate is inherent in it. The

doctrine of estoppel by election is one among the species of estoppel in pais (or equitable estoppel), which is a rule of equity. By this law, a person may be precluded, by way of his actions, or conduct, or silence when it is his duty to speak, from asserting a right which he would have otherwise had.”

24. There is no denying fact that the petitioner was entitled for grade of Rs.5700-10100 being diploma holder for the post of Sanitary Inspector retrospectively from the date he came to be appointed i.e. in 1996 but the respondents, without any rhyme or reason, have issued the appointment order in favour of the petitioner by appointing him as Sanitary Inspector in a lower pay scale i.e. Rs.1200-2040 (un-revised) and paying of the lower grade finds mention in the appointment order of the petitioner which was subject to the confirmation by the Director Urban Local Bodies, Kashmir and the same was confirmed by the Competent Authority from the said date. Once, the respondents have admitted their mistake of granting the lower pay scale to the petitioner in spite of the fact that the petitioner was entitled for the higher grade being diploma holder, then it was incumbent on the part of the respondents to have rectified their mistake by granting him the benefit of the said grade retrospectively from the date when the petitioner came to be appointed along with all consequential benefits.

25. There is an admission on the part of the respondents that the petitioner was entitled for the said grade retrospectively from the date he came to be appointed while recommending his case by virtue of communication dated 31.12.2009. The respondents thereafter rectified their mistake by granting the said grade to the petitioner prospectively w.e.f. 2010 instead of 1996 by virtue of order dated 27.10.2010. Thus the action of the respondents was violative of mandate of equality enshrined in Article 14 of the Constitution of India, as similarly situated employees having diploma continued to get the said grade

with the sole exception of the petitioner who has been discriminated without any fault.

26. Hon'ble the Supreme Court in catena of judgments has held that mandate as contained in Article 14 envisages that there would be equality before law and equal protection of law and it was inferred therefrom that there must be "*equal pay for equal work*". Article 39 of the Constitution of the India enshrines the principle of "*equal pay for equal work*" and the aforesaid doctrine is not an abstract doctrine and has been held to be a vital and vigorous doctrine accepted throughout the world. With a view to apply the aforesaid doctrine the relevant condition is whether the nature of the duties and functions discharged and the work done is similar and once granting of the grade was having diploma in the relevant field, then the respondents by no stretch of imagination can discriminate the petitioner viz-a-viz. similarly situated employees. Thus, applying the aforesaid doctrine of '*equal pay for equal work*' the petitioner is also entitled for the same being diploma holder retrospectively from the date he came to be appointed.

27. In this regard, I am fortified by the view taken by the Hon'ble Apex Court in case of **State Of Punjab Vs Jagjit Singh & ors.** reported as **2017(1)SCC 148**. The relevant extract therefrom is reproduced as under:

"Dhirendra Chamoli v. State of U.P. (1986) I SCC 637, decided by a two-Judge bench:

Two Class-IV employees of the Nehru Yuvak Kendra, Dehradun, engaged as casual workers on daily-wage basis, claimed that they were doing the same work as Class-IV employees appointed on regular basis. The reason for denying them the pay-scale extended to regular employees was, that there was no sanctioned post to accommodate the petitioners, and as such, the assertion on behalf of the respondent-employer was, that they could not be extended the benefits permissible to regular employees. Furthermore, their claim was sought to be repudiated on the ground, that the petitioners had taken up their employment with the Nehru Yuvak Kendra knowing fully well, that they would be paid emoluments of casual workers engaged on daily-wage basis, and therefore, they could not claim beyond what they had voluntarily accepted.

(ii) This Court held, that it was not open to the Government to exploit citizens, especially when India was a welfare state, committed to a socialist pattern of society. The argument raised by the Government was found to be violative of the mandate of equality, enshrined in Article 14 of the Constitution. This Court held that the mandate of Article 14 ensured, that there would be equality before law and equal protection of the law. It was inferred therefrom, that there must be 'equal pay for equal work'. Having found, that employees engaged by different Nehru Yuvak Kendras in the country were performing similar duties as regular Class-IV employees in its employment, it was held, that they must get the same salary and conditions of service as regular Class-IV employees, and that, it made no difference whether they were appointed on sanctioned posts or not. So long as they were performing the same duties, they must receive the same salary.”

28. The grievance projected by the petitioner that he was given the grade of Rs.4000-6000 which was lower than the grade applicable to the Sanitary Inspector with Diploma holder and in that regard, he made numerous representations before the respondents to redress his grievance which were neither considered by the respondents nor any action has been taken by the respondents. *Per contra*, it is categorical stand of the respondent that the appointment of the petitioner has been made contrary to the rules. It is alleged that petitioner, having diploma in Sanitary Inspector Course, is not only the criteria for placing him on some higher grade. As per the stand of the respondents, the petitioner should fulfil the criteria for the next higher post. Once the competent authority would have availability of posts, the matter will be referred to DPC, wherein, all the eligible candidates including the petitioner can be considered in case he fulfils the criteria.

It is trite that an employee is free to challenge the conditions of his/her appointment order in case the same is not in conformity with law and he is not estopped under law to question it at a stage where he/she finds himself/herself aggrieved. Reliance in this regard is made to judgment of Hon'ble the Supreme Court in **Somesh Thapliyal & anr v. Vice Chancellor, HNB**

Garhwal University & anr, reported as **2021(10)SCC 116**, wherein it has been held as follows:

“The submissions of the learned counsel for the respondents that the appellants have accepted the terms and conditions contained in the letter of appointment deserves rejection for the reason that it is not open for a person appointed in public employment to ordinary choose the terms and conditions of which he is required to serve. It goes without saying that employer is always in a dominating position and it is open to the employer to dictate the terms of employment. The employee who is at the receiving end can hardly complain of arbitrariness in the terms and conditions of employment. This Court can take judicial notice of the fact that if an employee takes initiation in questioning the terms and conditions of employment, that would cost his/her job itself.

The bargaining power is vested with the employer itself and the employee is left with no option but to accept the conditions dictated by the authority. If that being the reason, it is open for the employee to challenge the conditions if it is not being in conformity with the statutory requirement under the law and he is not estopped from questioning at a stage where he finds himself aggrieved.

In the instant case, they lodged the protest petition and brought their grievance to the notice of the respondents but were unable to question except to pray the almighty to consider their grievance sympathetically.”

29. It is to be noted that the petitioner has sufficiently explained the delay in filing the writ petition as from 1997 till 2010, he has continuously filed numerous representations and the said representations have neither been disposed of nor has any action been taken by the respondents. Therefore, the action on the part of the respondents is violative of Articles 14 and 16 of the Constitution of India as the petitioner has made series of representation to the respondents to address his difficulty. Moreso, this assertion has not been specifically denied by the respondents in their objections. In this regard, I am fortified by the view of the Hon’ble Supreme Court in **Ashok Kumar v. State of Bihar and Ors.** reported as **2008 (8) SCC 445**. The relevant para is reproduced as under:

“3. On grant of leave, we have heard the learned counsel for the parties. Having heard the Earned counsel for the parties and after examining the orders of the High Court, viz., the order of the Division Bench impugned in this appeal and the order of the learned Single Judge, we are of the view that the Division Bench as well as the learned single

Judge of the High Court were not justified in rejecting the writ petition as well as the writ appeal on the ground of delay and laches as the writ petitioner i.e. the appellant had moved the writ petition before the High Court against the decision of the State Government only in 1996, i.e. after 4 years from the date of passing of such order. The Division Bench as well as the learned Single Judge, in our view, had committed an error in holding that the pendency of the review/representation of the writ petitioner/appellant could not be taken to be a ground for condoning the delay after 4 years of the decision of the State Government. In our view, the High Court had fallen into error in not holding that the appellant had sufficiently explained why the writ petition could not be moved or why it was moved after 4 years of the decision of the State Government. Since the appellant had filed a representation/review of the decision of the State Government, it was expected by him that an order should be passed on the said representation/review. Therefore, in our view, the delay in moving the writ application against the decision of the State Government was sufficiently explained by the appellant and, therefore, the writ petition ought not to have been dismissed on the ground of delay and laches. Accordingly, we set aside the impugned orders of the Division Bench as well as of the learned Single Judge. The writ petition is, accordingly, restored to its file. The High Court is requested to decide the writ petition on merits in accordance with law after giving opportunity of hearing to the parties and after permitting the parties to exchange their affidavits, if not already exchanged in the meantime. Accordingly, the appeal is allowed to the extent indicated above. There will be no order as to costs."

30. It is pertinent to mention here that the inaction of the respondents has denied the petitioner's right to be considered for promotion and his right to get equal salary as is being paid to similarly situated persons. This inaction on part of the respondents is highly discriminatory in nature and has tendency to deprive the petitioner of his legitimate right to get his salary. I am fortified by the view taken by Hon'ble the Supreme Court in **Union of India & ors. V. N. Murugesan & ors.** reported as (2022) 2 SCC 25, wherein it has held as under:

"...Therefore, a State is not expected to act adversely to the interest of the employee, and any discrimination should be a valid one. Ultimately, one has to see the overwhelming public interest as every action of the instrumentality of the State is presumed to be so. While applying the said principle, one has to be conscious of the fact that there may not be a legitimate expectation on the part of an employee as against the statute."

31. In **Imtiyaz Ahmed Malik Versus State & Ors, (2010) 2 SriLJ 658**, this Court in paras 13, 14, 15, 16, and 17 has held as under :

“12.The State and its authorities are duty bound to deal with its citizens in accordance with the mandate of statute and other laws. If some of the citizens are similarly situated then they are to be considered for being given uniform treatment as they form a single class in law.

13.Once it is pleaded and alleged in the writ petition that petitioner has been subjected to invidious discrimination which is infringement of constitutional guarantees as contained in Article 14 and 16 of the Constitution, the burden shifts on the respondent-state/authorities to satisfy the court that none of the rights guaranteed under said articles of Constitution have been infringed in respect of petitioner.

15. The contention that the beneficiaries of the government orders have not been made party respondents is no requirement of law in such type of writ petitions. Petitioner is not aggrieved of action of the Government by appointing those persons on compassionate grounds in relaxation of rules so they were not required to be impleaded as party in the writ petition. The petitioner has referred to their cases in the writ petition only to show that he forms class with them, but has been treated dissimilarly and in process violating his constitutional rights as guaranteed in Articles 14 and 16 of the Constitution.

17. The respondent-State and its authorities as already stated are duty bound to give uniform treatment to the persons who are similarly situated.”

32. The legal principles expounded in the aforesaid authorities are squarely attracted and I see no reason to deprive the legal heirs of the petitioner to get all the monetary benefits.

Conclusion

33. For all what has been observed and discussed above, the respondents have failed to prove that the appointment of petitioner is contrary to rules. Petitioner, being diploma holder in Sanitary Inspector Course, has not only succeeded to establish that he is entitled to be placed in the grade pay of Rs.5000-8000 (pre-revised) w.e.f. 20.11.1996 though said benefit was extended to him on 27.10.2010 prospectively, but also entitled to be placed in the seniority list of Sanitary Inspectors with Diploma holders w.e.f. 1996.

34. Viewed thus, the present petition is allowed. The impugned seniority list of non diploma Holders Sanitary Inspectors to the extent of placement of the petitioner in the grade pay of Rs.4000-6000 is quashed and the

respondents are directed to place the petitioner in the grade of Rs.5000-10100 (pre-revised) retrospectively from the date of his initial engagement order i.e. 20.11.1996. The respondents shall reckon all the monetary benefits on the basis of difference of pay between grade Pay Rs.4000-6000 and Rs.5000-8000 and shall pay the same to the legal heirs of the petitioner, as having been appointed as Sanitary Inspector with Diploma Holder along with all consequential benefits retrospectively from the date of his initial appointment i.e. from 20.11.1996.

35. The entire exercise shall be concluded by the respondents within a period of two months from the date a copy of this order is served upon the respondents by the legal heirs of the petitioner.

(WASIM SADIQ NARGAL)
JUDGE

Srinagar
03.08.2023
MUBASHIR

Whether the judgment is reportable ?	Yes
Whether the judgment is speaking ?	Yes